Supreme Court, U.S.
FILED
JUN 4 1993
OFFICE OF THE CLERK

No. 92-1785

In The

Supreme Court of the United States

October Term, 1992

IHC HOSPITALS, INC., CHARLES L. DOANE, MERRILL C. DAINES, LEE S. BROADBENT, ROBERT L. JENSEN, C. CHRIS FRIESS, AND CHARLES T. SWALLOW,

Petitioners,

v.

JOSEPH F. DECKER,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

DAVID K. ISOM
DAVID K. ISOM & ASSOCIATES, P.C.
Suite 1680 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111-1006
Telephone: (801) 366-6000

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTION PRESENTED

1. Whether the Tenth Circuit Court of Appeals erred in holding that the district court order denying petitioners' motion to dismiss respondent's complaint was not immediately appealable because the Health Care Quality Improvement Act of 1986, 42 U.S.C. Sec. 11101 et seq., does not entitle petitioners to immunity from suit.

TABLE OF CONTENTS

Page

ARGUMENT 2

I. As Petitioners Admit, There Is Complete Uniformity Between the United States Courts of Appeals Which Have Ruled on the Issues Presented Here 2

II. The Tenth Circuit's Decision in the Instant Case Is Consistent with Decisions of this Court 3

III. Petitioners' Policy Arguments for Granting the Writ Merely Reflect Their Dissatisfaction with the Way that HCQIA Affects Them 5

CONCLUSION 6

TABLE OF AUTHORITIES

Page

CASES

Decker v. IHC Hospitals, Inc., 982 F.2d 433 (10th Cir. 1993) 3, 4, 5

Manion v. Evans, 986 F.2d 1036 (6th Cir. 1993) 3

Patrick v. Burget, 486 U.S. 94 (1988) 5

Summit Health, Ltd. v. Pinhas, 111 S. Ct. 1842 (1991) 4

STATUTES

Health Care Quality Improvement Act of 1986, 42 U.S.C. Sec. 11101 et seq., ("HCQIA") ..... *passim*

No. 92-1785

In The

Supreme Court of the United States

October Term, 1992

IHC HOSPITALS, INC., CHARLES L. DOANE, MERRILL C. DAINES, LEE S. BROADBENT, ROBERT L. JENSEN, C. CHRIS FRIESS, AND CHARLES T. SWALLOW,

Petitioners,

v.

JOSEPH F. DECKER,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

Respondent, Joseph F. Decker, by and through his attorneys of record, hereby submits his brief in opposition to the petition for writ of certiorari.

ARGUMENT

I. As Petitioners Admit, There Is Complete Uniformity Between the United States Courts of Appeals Which Have Ruled on the Issues Presented Here

Both United States Courts of Appeals which have considered the issues presented here have held that the Health Care Quality Improvement Act of 1986, 42 U.S.C. Sec. 11101 et seq., ("HCQIA")[1] does not create a right of immunity from suit for hospital peer review participants. These courts have also held that, as a consequence, peer reviewers have no right of immediate appeal from a district court's denial of a motion to dismiss, because such a right of immediate appeal would only exist if HCQIA created a right not to be sued.

In the instant action, petitioners moved to dismiss respondent Decker's action on the alleged ground that HCQIA entitled them not only to immunity from liability, but also to immunity from suit. When the District Court of Utah denied their motion, petitioners appealed to the Tenth Circuit Court of Appeals. The Tenth Circuit concluded that HCQIA establishes immunity from liability only, not immunity from suit, and that petitioners' asserted right to be free from liability can be effectively vindicated in a future appeal of a final order. On this basis, the Tenth Circuit held that the district court's order denying petitioners' motion to dismiss was not immediately appealable and dismissed the appeal for lack of

---

[1] Relevant sections of HCQIA are reproduced in Appendix A to petitioners' Petition for Writ of Certiorari.

appellate jurisdiction. *Decker v. IHC Hospitals, Inc.*, 982 F.2d 433 (10th Cir. 1993).[2]

The Sixth Circuit's holding in *Manion v. Evans*, 986 F.2d 1036 (6th Cir. 1993), conforms completely with *Decker*. In *Manion*, the defendant hospital and its president appealed the district court's denial of summary judgment in plaintiff Manion's antitrust action based upon the theory of bad faith peer review. The defendants moved for summary judgment on the theory that they were immune from suit under HCQIA. Manion asserted that the appellate court lacked jurisdiction because the district court order denying summary judgment was not appealable. After discussing *Decker*, the Sixth Circuit concluded that HCQIA does not create a right not to be sued, and that the district court order declining summary judgment was therefore not immediately appealable. *Id.* at 1042.

The *Decker* and *Manion* cases are identical in all material respects, and their holdings are in complete accord with each other. Therefore, as petitioners acknowledge, there is no conflict between the Courts of Appeals or other courts with respect to the issues presented here.

II. The Tenth Circuit's Decision in the Instant Case Is Consistent with Decisions of this Court

In three places in their petition, petitioners assert that the issues concerning immunity under HCQIA raised in this litigation are issues previously undecided by this

---

[2] The opinion is reproduced in Appendix B to petitioners' Petition for Writ of Certiorari.

Court. Petition for Writ of Certiorari at 2, 11, 14. Utterly inconsistently, petitioners later assert that the Tenth Circuit decision in the instant case is inconsistent with this Court's "interpretation" of HCQIA given in *Summit Health, Ltd. v. Pinhas*, 111 S. Ct. 1842, 1848 n.12 (1991).

Petitioners' ambivalence is understandable. They base their claim of inconsistency on a single sentence from a footnote in *Summit Health*. However, the sentence is dicta. *Summit Health* was limited to issues of federal jurisdiction under the Sherman Act and does not even mention HCQIA except in the footnote cited by petitioners. Furthermore, the sentence fails to support the claim that HCQIA creates immunity from suit. It says only that, "[HCQIA] provides for immunity from antitrust, and other, actions if the peer-review process proceeds in accordance with [HCQIA's requirements]." *Summit Health*, 111 S. Ct. at 1848 n.12. *Summit Health* does not distinguish between immunity from suit and immunity from damages, which is the critical issue here. Moreover, the footnote from which the sentence is extracted goes on to say that, " '[HCQIA's] immunity provisions [were] restricted so as not to protect illegitimate actions taken under the guise of furthering the quality of health care. . . . ' " *Id.* (quoting 132 Cong. Rec. H9957 (Oct. 14, 1986) (remarks of Rep. Waxman)). This suggests that the immunity provisions should be treated restrictively rather than expansively.

The sentence relied upon by petitioners does not support their claim that *Decker* is inconsistent with *Summit Health*. Petitioners were correct when they asserted that the immunity questions at issue in this case have not been decided by this Court.

III. Petitioners' Policy Arguments for Granting the Writ Merely Reflect Their Dissatisfaction with the Way that HCQIA Affects Them

Petitioners have repeated the arguments which failed before the Tenth and Sixth Circuits and have asked this Court to review *Decker* in light of them. However, petitioners' reasons for asking the Court to undertake this review are unpersuasive.

First, petitioners assert that review is appropriate because the *Decker* decision affects "the quality of health care and the cost of medical services." Petition for Writ of Certiorari at 11. By this reasoning, this Court should review every appellate court decision that affects these concerns, even if the decision conforms with holdings of other appellate courts. Clearly, this Court cannot afford that luxury.

Second, petitioners contend that "the court of appeals has erroneously undermined the national interest identified in HCQIA" by "erroneously refusing to allow an interlocutory appeal." *Id.* at 15. However, petitioners are unable to cite a single case in which a court has disagreed with the Tenth Circuit's (and Sixth Circuit's) interpretation of the immunity provisions of HCQIA. Rather, petitioners are simply dissatisfied with the way in which HCQIA, as interpreted by two federal Courts of Appeals, applies to them. It is not the function of this Court to deal with that dissatisfaction. As the Court stated in *Patrick v. Burget*, 486 U.S. 94, 106 n.8 (1988), "[i]f physicians believe that [HCQIA] provides insufficient immunity to protect the peer-review process fully, they must take that matter up with Congress."

CONCLUSION

The Tenth Circuit's decision in the instant case does not conflict with decisions of other Courts of Appeals or of this Court. Petitioners' reasons for asking this Court to review the Tenth Circuit decision are unpersuasive and merely reflect their dissatisfaction with the way in which HCQIA, as interpreted by two federal Courts of Appeals, affects them. Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

DAVID K. ISOM
DAVID K. ISOM & ASSOCIATES, P.C.
Suite 1680 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111-1006
Telephone: (801) 366-6000

Attorneys for Respondent